SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 147 147

NEW JERSEY REALTY TITLE INSURANCE COMPANY,

Appellant,

vs.

DIVISION OF TAX APPEALS IN THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW JERSEY AND THE CITY OF NEWARK.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

STATEMENT AS TO JURISDICTION

WALTER GORDON MERRITT,
CHARLES B. NIEBLING,
H. GARDNER INGRAHAM,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

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No. 147

NEW JERSEY REALTY TITLE INSURANCE COMPANY,

Appellant,

vs.

DIVISION OF TAX APPEALS IN THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW JERSEY, AND THE CITY OF NEWARK, A MUNICIPAL CORPORATION,

Appellee

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

STATEMENT AS TO JURISDICTION

Pursuant to Rule 12 of the Rules of the Supreme Court of the United States, as amended, the above named appellant presents this, its statement particularly disclosing the basis upon which appellant contends that the Court has jurisdiction upon appeal to review the judgment appealed from herein.

I. *Nature of case:* The case involves the power of a state to tax bonds of the United States. The precise question

presented, as is shown more fully hereinafter, is the constitutionality, under the provisions of the Constitution of the United States quoted below * and under Section 3701 of the Revised Statutes of the United States (31 U. S. C. A. § 742),** of the proviso clause of a property tax statute of New Jersey pursuant to which the City of Newark, an appellee herein, levied a personal property tax assessment for the year 1945 of 15% of the sum of the paid-up capital and surplus, less liabilities, of appellant, without excluding from the sum so assessed, United States Treasury Bonds held by appellant, and without any apportionment or deduction on account of said bonds.

The Supreme Court of New Jersey upheld the clause and statute as so applied to the United States Treasury Bonds. Its opinion is hereto appended (App. "A", pp. 13-18). The appellant claims that the clause and statute as so applied violate the aforesaid provisions of the Federal Constitution, as well as R. S. § 3701.

II. *Statutory Provision Sustaining the Jurisdiction:* The statutory provision which sustains the jurisdiction of this Court to review on appeal the judgment appealed from herein is Title 28, United States Code, section 1257(2).

III. *State Statute, the Validity of Which Is Involved:* The state statute, the validity of which as applied to the United States Treasury Bonds held by appellant, is involved, is Section 54:4-22 of the Revised Statutes of New Jersey, 1937 (Vol. II, Title 54, p. 27), as amended by Chap-

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* "The Congress shall have power * * * To borrow Money on the credit of the United States" (Art. I, Sec. 8, cl. 2). "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme law of the Land" (Art. VI, par. 2).

"* * * nor shall any State deprive any person of * * * property without due process of law" (Amendment XIV, Sec. 1).

** "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

ter 245 of the Pamphlet Laws of 1938. The statute, as so amended, constitutes Title 54, Chapter 4, Section 22 of the Revised Statutes Cumulative Supplement of New Jersey containing the Laws of 1938, 1939, 1940 (R. S. Cum. Supp. 54:4-22), and is found at pages 550-551 of said Supplement.

The statute appears in the Revised Statutes of New Jersey as part of "Subtitle 2. Taxation of Real and Personal Property in General" of Title 54, and provides:

> "54:4-22. *Taxation of stock insurance companies.* Every stock insurance company organized under the laws of this state, other than a life insurance company, shall be assessed and taxed in the taxing district where its office is situated, upon the full amount or value of its property (exclusive of real estate and tangible personal property, which shall be separately assessed and taxed where the same is located, and exclusive of all shares of stock owned by such insurance company and exclusive of nontaxable property and of property exempt from taxation), deducting from such amount or value all debts and liabilities certain and definite as to obligation and amount, and the full amount of all reserves for taxes, and such proportion of the reserves for unearned premiums, losses and other liabilities as the full amount or value of its taxable intangible property bears to the full amount or value of all its intangible property; provided, however, the assessment against the intangible personal property of any stock insurance company subject to the provisions of this section shall in no event be less than fifteen per centum of the sum of the paid-up capital and the surplus in excess of the total of all liabilities of such company, as the same are stated in the annual statement of such company for the calendar year next preceding the date of such assessment and filed with the department of banking and insurance of the state of New Jersey, after deducting from such total of capital and surplus the amount of all tax assessments against any and all real estate, title to which stands in the name of such company.

> The capital stock in any such company shall not be regarded for the purposes of this act [section] as a liability and no part of the amount thereof shall be deducted, and the person or persons or corporations holding the capital stock of such company shall not be assessed or taxed therefor. No franchise tax shall be imposed upon any insurance company included in this section."

The assessment involved in this case was levied under the proviso clause, and the substantial federal questions of constitutionality which are presented on this appeal arise therefrom, as shown hereinafter.

IV. *Dates of Judgment and Application for Appeal.* The judgment of the Supreme Court of New Jersey which is sought to be reviewed herein was entered March 7, 1949. The petition for allowance of an appeal to this Court is presented to the Honorable Harold H. Burton, Associate Justice of this Court, on June 2, 1949.

V. *Summary of Facts and Rulings:* Appellant's personal property return for the year 1945 under the New Jersey statute herein involved showed, among other items, total assets of $774,972.98 comprised in part of United States Treasury Bonds of the par value of $450,000 and of $1,682.25 accrued interest thereon. It showed further that, after excluding said bonds and interest and other property exempt under the formula contained in the first portion of the statute, and after deducting debts, liabilities and reserves authorized to be deducted under that formula, a minus figure resulted and hence there could be no assessment under that formula.

Applying the proviso clause of the statute, however, the City of Newark levied an assessment of $75,700 on appellant's personal property for the year 1945. That amount represented approximately, and was intended to represent

precisely, 15% of the paid-up capital and surplus, less liabilities, of appellant without any exclusion of, or any apportionment or deduction on account of, the United States Treasury Bonds held by appellant. The tax based on the assessment has been paid by appellant, but appellant will be entitled to refund if ultimately successful in this cause.

Appellant appealed the assessment to the Essex County Board of Taxation on the ground that the statute, as so applied, was unconstitutional. The Board decided that the appeal should be made to another tribunal in order that the constitutional question might be determined. Appellant thereupon appealed the assessment to the Division of Tax Appeals in the State Department of Taxation and Finance, an appellee herein. On April 22, 1947, after hearing before two Commissioners, the Division rendered judgment dismissing the appeal. The Commissioners' report which was filed on the same date as the judgment, states:

> "This is a personal property appeal wherein the petitioner attacks the constitutionality of the assessment. This is not a proper court for the determination of such a question, and therefore, it is recommended that the appeal be dismissed."

No other opinion was rendered by or on behalf of the Division.

On August 3, 1948, on writ of certiorari, the then established New Jersey Supreme Court (which has been succeeded by the Superior Court) reversed the judgment of the Division of Tax Appeals and remanded the cause to the Division to fix the amount of the assessment in accordance with the Court's opinion. A copy of the opinion is hereto appended (App. "B", pp. 19-22). The court held in it that the tax imposed by the statute was an *ad valorem* tax on personal property and not an excise tax, and that

the United States Treasury Bonds held by appellant were to be excluded in computing capital and surplus assessable under the proviso clause, since otherwise the clause (or statute) would contravene Federal law.

On appeal by the City of Newark to the New Jersey Court of Errors and Appeals, the successor of that court, namely, the present Supreme Court of New Jersey, reversed the judgment of the former New Jersey Supreme Court and upheld the statute as applied. The court's opinion (App. "A", pp. 13-18) includes the following sentences which summarize the holding.

> "We have concluded that the tax levied under this statute is not an ad valorem tax or property tax but rather is a valid tax upon the net worth of the company even though there be included in the calculation of the net worth certain exempt federal securities or their income" (App. "A", p. 16).
>
> "• • • The constitutional power of one government to reach a permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon such securities. *Educational Films Corp.* v. *Ward*, supra [28 U. S. 379, at 389] (id., pp. 17-18).
>
> "This seems to be the applicable rule whether the taxing statute is a franchise tax or a tax upon the net worth of the company, which latter we hold the tax under the statute before us to be" (App. "A", p. 18).

The conclusions stated in the first and third sentences of the foregoing quotation are contrary to those held by this Court, as is shown below.

VI. *The Federal Question Involved Is Substantial:* In sustaining the validity of the proviso clause of the statute as applied to the United States bonds held by appellant, the Supreme Court of New Jersey decided an important Federal question in a way which conflicts with (A) applicable

decisions of this Court holding comparable tax statutes, when applied to United States bonds or securities, unconstitutional under the borrowing and supremacy clauses of the Federal Constitution(quoted *supra*, p. 2); and (B) the explicit prohibition enacted by Congress in R. S. § 3701 (quoted *supra*, p. 2), which prohibition is binding on the states under the supremacy clause.

(A) The decision of the Supreme Court of New Jersey is in direct conflict with this Court's decisions in the following cases applying the doctrine of *Weston* v. *City Council of Charleston*, 2 Pet. 449, and *McCulloch* v. *Maryland*, 4 Wheat. 316, to state or municipal taxes or assessments under state statutes analogous to that herein involved. *Farmers Bank* v. *Minnesota*, 232 U. S. 516 (1914) (state property tax on bank's surplus of assets, other than real estate, in excess of deposits and other accounts payable, where computation of assets included bonds of municipalities in federal territories); *Bank of Commerce* v. *New York City*, 2 Black 620 (1862) (assessment on actual value of bank's capital stock without excluding bank's investment in United States stocks, bonds and securities); *Bank Tax* case, 2 Wall. 200 (1864) (assessment on valuation measured by surplus, earnings and capital stock paid in or secured to be paid in, without excluding capital invested in United States stock); *The Banks* v. *The Mayor* (1868) (id., except involving inclusion of certificates of indebtedness and notes of the United States); *Home Savings Bank* v. *Des Moines*, 205 U. S. 503 (1907) (assessment on shares of stock valued to reflect assets including United States bonds).

In each of these cases this Court held that the aforesaid clauses of the Constitution prohibited the state, or city acting under state authority, from taxing the United States obligations involved through the device of taxing corporate worth, assets or capital, or a valuation based thereon, wit-

out excluding the value of such obligations. See also *Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313, which goes further than appellant's contentions herein.

The tax in *Farmers Bank* v. *Minnesota, supra*, was substantially identical with that presented herein. The unanimous opinion of the Court states (232 U. S. at 528):

> "It is, however, further suggested that the judgment under review does not sustain a tax upon the bonds as property, but only a tax upon the surplus of the Savings Bank, computed by taking into the account all of its assets, amounting to about $12,000,000, of which the bonds were only about $700,000, and deducting therefrom its liabilities. But as the surplus is treated as property and taxed as such, it is obvious that some portion of the burden of the tax is attributable to the ownership of the municipal bonds. In *Bank of Commerce* v. *New York City*, 2 Black, 620, it was held that the State of New York in taxing the capital of banks according to its valuation must leave out of the calculation that portion of the capital invested in the stocks, bonds, or other securities of the United States not liable to taxation by the State. And see *Bank Tax Case*, 2 Wall. 200; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 509.
>
> "It results that the inclusion of the bonds now in question in the list of the assets of plaintiff in error, in ascertaining its surplus for the purpose of imposing a state property tax thereon, was repugnant to the Constitution of the United States."

The analysis and decision in the *Farmers Bank* and earlier cases above cited, while not followed or mentioned by the Supreme Court of New Jersey, have never been overruled or to any extent modified by this Court. The Department of Justice's study entitled "Taxation of Government Bondholders and Employees", published in 1938, correctly states (pp. 24-25):

> "The Court has many times considered the validity of taxes imposed upon the 'capital' or the 'assets' of

corporations. In each of the cases it has held the tax invalid, unless provisions were made for deducting the value of government bonds held by the corporation."

That the tax herein involved is a property tax, as in the *Farmers Bank* and earlier cases, is clear from the express terms, as well as the context and local administration, of the New Jersey statute (*supra*, pp. 3-4). The proviso clause of the statute itself refers to "the assessment *against the intangible personal property*"; the judgment of the Division of Tax Appeals likewise referred to "the assessment levied for the year 1945 on the above described property." (Italics supplied.) Also, the opinion of the former New Jersey Supreme Court stated that the tax is "not an excise, but an *ad valorem* tax on personal property" (App. "B", p. 20).

The fact that the present Supreme Court of New Jersey in its opinion, characterized the tax as "not an ad valorem or property tax," does not, of course, preclude this Court from determining, or in any way limit this Court in determining, the true character of the tax for purposes of deciding the Federal question. *United States* v. *Allegheny County*, 322 U. S. 174. 184; *Schuylkill Trust Co.* v. *Penna.* 296 U. S. 113, 119; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 280 and cases there cited; *Home Savings Bank* v. *Des Moines, supra.* The rule is that "the descriptive pigeonhole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, at 443.

(B) If, as is claimed and has been shown, the assessment herein was levied partly upon the United States bonds owned by appellant, then R. S. § 3701 (31 U. S. C. A. § 742) and the supremacy clause of the Constitution clearly were violated. *Home Savings Bank* v. *Des Moines, supra.*

This would be true whether or not the borrowing clause of the Constitution is held to have been violated.

The Court recently has referred to "the long established Congressional intent to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit." *Smith* v. *Davis*, 323 U. S. 111, at 117. The judgment of the Supreme Court of New Jersey, if allowed to stand, would subvert that intent of Congress.

VII. *Manner in Which Federal Question was Raised:* The federal question was raised at the outset and urged throughout the proceedings in New Jersey. Indeed, it was and is the whole basis of the case.

Appellant's "Petition of Appeal" to the Division of Tax Appeals, which commenced the proceeding therein, contested the assessment on the ground that the New Jersey statute "is unconstitutional" in that the proviso clause "in effect levies a tax upon non-taxable and exempt securities owned by petitioner * * *." The bases of this contention, including reliance upon R. S. §3701 (31 U. S. C. A. §742), were made clear by counsel for appellant early in the hearing before the Division. He there stated:

> "The contention of the petitioner is that the statute is unconstitutional, first, in that the application of the proviso for a minimum assessment operates to impose a direct tax upon bonds of the United States owned by the petitioner which are exempt from state and local taxation under the principle first enunciated by the United States Supreme Court in the case of McCulloch against Maryland and in a long line of cases following that decision, and by force of the Act of Congress Title 31 United States Code Annotated in Section 742 providing that stocks, bonds, treasury notes and other obligations of the United States shall be

exempt from taxation by or under state or municipal or local authority." *

An additional ground of unconstitutionality asserted by counsel, but not now urged, was that the statute embodied an arbitrary classification resulting in discriminatory taxation contravening the Federal Fourteenth Amendment and the State Constitution.

As already shown (supra, pp. 5-6), the Division did not undertake to rule upon the constitutional questions, since New Jersey law precluded it from so doing; but both the former New Jersey Supreme Court and the present Supreme Court of New Jersey did decide the questions now sought to be reviewed. The opinions of those courts show that the federal point based on R. S. §3701 and the supremacy clause, as well as that based on this Court's decisions under the borrowing clause of the Constitution, was presented to and determined by each, respectively (See especially App. "A", pp. 13, 15, 17-18; App. "B", pp. 19-20, 21).

Although the opinion of the Supreme Court of New Jersey states (App. "A", p. 16) that the New Jersey Realty Title Insurance Company contended that the case of *Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313, was controlling, that case was not cited in the Company's brief. The Company's brief (pp. 9, 11) in that court did invoke, among other cases, *McCulloch* v. *Maryland*, supra, p. 7, *Bank of Commerce* v. *New York*, id; and *Home Savings Bank* v. *Des Moines*, id., which, however, were not referred to in the court's opinion.

VIII. *Cases Sustaining the Jurisdiction:* The cases which are believed to sustain the jurisdiction are, among others, *Farmers Bank* v. *Minnesota*, 232 U. S. 516; *Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313; each of the other cases hereinbefore cited on page 7; *Northwestern Ins. Co.* v. *Wisconsin*,

* This statement is quoted from the transcript of the hearing and appears on p. 20a of the "Appendix to Appellants' Brief" in the Supreme Court of New Jersey, which constituted the printed record therein.

275 U. S. 136; *Nat'l Life Ins. Co.* v. *United States*, 277 U. S. 508, *United States* v. *Allegheny County*, 322 U. S. 174. Cf. *Zucht* v. *King*, 260 U. S. 174.

Conclusion

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal under Title 28, United States Code, section 1257(2).

Dated: May 31, 1949.

WALTER GORDON MERRITT,
CHARLES B. NIEBLING,
H. GARDNER INGRAHAM,
Attorneys for Appellant.

APPENDIX "A"

SUPREME COURT OF NEW JERSEY, SEPTEMBER TERM, 1948

No. A 222

NEW JERSEY-REALTY TITLE INSURANCE COMPANY, *Prosecutor-Respondent,*

vs.

DIVISION OF TAX APPEALS IN THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW JERSEY and the CITY OF NEWARK, a Municipal Corporation, *Defendants-Appellants*

Argued January 31, 1949. Decided March 7, 1949

On Appeal from the former Supreme Court, whose Opinion Is Reported in 137 N. J. L. 444

Mr. Vincent J. Casale, argued the cause for the appellant, the City of Newark; Mr. Thomas L. Parsonnet, on the brief.

Mr. Charles B. Niebling, argued the cause for the prosecutor-respondent.

A brief, amicus curiae, was filed by leave of the Court, by the Cities of Camden, Mr. John J. Crean and Mr. Norman Heine, attorneys, and Trenton, Mr. Louis Josephson, Attorney.

The opinion of the Court was delivered by OLIPHANT, *J.*:

This appeal is from the former Supreme Court which on certiorari, reversed a judgment of the Division of Tax Appeals sustaining an assessment levied on the property of respondent pursuant to R. S. 54:4-22. The decision of the former Supreme Court was rested on the ground that the tax was not an excise tax, but an ad valorem tax on personal property, and that by taxing a fund composed of exempt property, in this case obligations of the United States which are exempt from state, municipal or local taxation under 31 U. S. C. A., Sec. 742 and R. S. 54:4-3, is to tax such

exempt property. We are not in accord with this interpretation of the statute.

The respondent is a stock insurance company subject to taxation under the cited statute, R. S. 54:4-22, supra.

The statute requires that the property of such companies, other than life insurance companies, shall be assessed and taxed in the taxing district where its office is situated, upon the full value of its property at the local rate and by the following formula.

There shall be excluded from the value of its property the following property: (a) Real estate and tangible property (which are taxed at the situs by general law); (b) all shares of stock owned by the company; (c) non-taxable property (which includes United States government securities which the state has no power to tax as such); (d) property exempt from taxation under the law of this state.

After excluding the above classes of property, there is deducted from the value of its property so found to be taxable the following items or debits (1) all debts and liabilities certain and definite; (2) the full amount of all reserves for taxes; (3) such proportion of the reserves for unearned premiums, losses, or other liabilities as the full amount of value of its taxable intangible property bears to the full amount and value of *all its intangible property.*

The arithmetical result produced by the application of the formula at this point is subject to the following controlling proviso which is integrated into the formula as a whole, that the assessment calculated under such formula shall in no event be less than 15 percent of the paid up capital and surplus in excess of all liabilities of the insurance company as the same are stated in the company's annual statement for the calendar year next preceding the assessing date and filed with the Department of Banking and Insurance, less the amount of the tax assessments against real estate owned by the company.

The total assets of the respondent as shown by its return were $774,972.98 which included the following items which were excluded under the formula, exempt property $461,682.25, mortgages on New Jersey real estate $129,175.32;

title plant $47,500.00, cash on deposit $136,594.74; other cash items and prepaid charges $5,981.89, making a total of excludable property of $770,454.20, which left a total of taxable intangibles of $4,583.78. The deduction for debts and liabilities, certain tax reserves and proportionate loss of reserves was $54,690.22 which left no balance of assessable property subject to tax at the local rate.

The respondent's capital stock and surplus on the assessing date as shown by its annual statement for the calendar year 1943 filed with the Department of Banking and Insurance totaled $547,462.93. The assessment placed upon the net worth of the respondent by the city assessor of Newark was $75,700.00.

The point made by the appellant city is that the tax imposed by R. S. 54:4-22 as amended by P. L. 1938, Chap. 245 is not an ad valorem tax against the property of the respondent, as was found by the Supreme Court.

It is well settled that a state has no power to assess against a corporation a tax which is essentially a property or income tax (whether it purports to be laid directly upon property or upon capital stock) as distinguished from franchise, privilege or excise taxes without allowing a deduction for sums invested in securities of the United States or from income derived from such sources. 51 Amer. Juris., sec. 797 and the cases cited there.

But it is equally well settled that a state has the power to levy a tax on a legitimate subject, such as corporate franchises or property, measured by net assets or income, even though there is included, in the measure of the tax, tax-exempt federal instrumentalities or the income derived therefrom. A state tax so measured is not an infringement of the immunity from taxation. *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 75 L. Ed. 400, 51 Sup. Ct. 170; *Tradesmens National Bank* v. *Oklahoma Tax Commission*, 309 U. S. 560, p. 564; 84 L. Ed. 947, p. 951, 60 Sup. Ct. 688.

We have concluded that the tax levied under this statute is not an ad valorem tax or property tax but rather is a valid tax upon the net worth of the company even though there be included in the calculation of the net worth certain exempt federal securities or their income.

The respondent contends that the case of *Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313, 74 L. Ed. 870, 50 Sup. Ct. 326, is controlling. The Court in that case held that where the statute discloses a purpose as a general rule to omit from taxation sufficient assets of the insurance company to cover their legal reserve and unpaid policy claims and it is competent for the state to permit a less reduction or none at all, then where the ownership of United States bonds is made the basis of denying the full exemption which is accorded those who own no such bonds, this amounts to an infringement of guaranteed freedom from taxation. We do not think this case is controlling in the present situation.

As we read R. S. 54:4-22 as amended, it does not tax the capital or surplus as such. The proviso in the statute simply fixes a floor below which the assessment under the formula is not permitted to go. In the operation of the formula an assessment in excess of 15 percent of the sum of paid-up capital and surplus is possible and when so found is taxable at the local rate. However when a minus sum is the result of the operation of the formula then the assessment is recalculated and the exclusions and deductions are accordingly reduced so as to produce an assessment against the intangible property which is not less in amount than 15 percent of the paid-up capital and surplus.

In the Gehner case, supra, it is true that similar exclusions and exemptions were established by state law and that the legislature reserved the right to alter or change these exemptions by law but in the formula set up in the Missouri statute the exemptions, exclusions and deductions were, for the purpose of arithmetical calculation, fixed

factors which had the effect of throwing the weight of the tax onto the tax exempt federal securities to the point of discrimination. Compare *Schuylkill Trust Co. v. Pennsylvania*, 296 U. S. 112, p. 120, 80 L. Ed. 91, 56 Sup. Ct. 31.

Such is not the situation presented by R. S. 54:4-22. While it is true that the legislature authorizes that certain property shall be excluded and exempted from the assessment and also permits certain other deductions and that our legislature, in the exercise of its reserve power, may alter or change any and all such items, they are not at the point of assessment fixed factors in the arithmetical taxing formula but are variable factors, because the legislature went one step further by the proviso which authorizes that these various items shall be accordingly reduced with the ultimate purpose to produce an assessment of the net worth of all the intangible property of the insurance company which in the aggregate may not be less in amount than 15 percent of the paid-up capital and surplus as defined by the statute. The assessment may equal or exceed 15 percent of the paid-up capital and surplus, and does not necessarily have to be precisely the same, but it can not be less in amount than 15 percent of the paid-up capital and surplus.

The tax assessor under the law is required to apply the statute without any discrimination and in such a way that there is no infringement of the constitutional immunity. Compare *Macallen Co. v. Mass.*, 279 U. S. 620, 73 L. Ed. 874, 49 Sup. Ct. 432; *Miller v. Milwaukee*, 272 U. S. 713, 71 L. Ed. 487, 47 Sup. Ct. 280; *Educational Films Corp. v. Ward*, supra; *Pacific Co. v. Johnson*, 285 U. S. 480, 76 L. Ed. 893, 52 Sup. Ct. 424.

If the assessment is made without discrimination then it makes no difference whether the corporate property which is the result of the tax may chance to include federal exempt securities. The constitutional power of one government to

reach a permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon such securities. *Educational Films Corp.* v. *Ward*, supra, at 389.

This seems to be the applicable rule whether the taxing statute is a franchise tax or a tax upon the net worth of the company, which latter we hold the tax under the statute before us to be. The statute is not designed to tax capital or surplus as such or any assets alleged to be included therein. The proviso in question merely fixes, as stated, a floor below which the assessment on the intangible property representing net worth shall not be permitted to go. The statute being subject to the constitutional prohibition against discrimination with respect to federal securities contains a sufficient standard to meet the test set forth in *Gaines* v. *Hudson County Assessors*, 37 N. J. L. 12 (Sup. Ct. 1873); *City of Hoboken* v. *Martin*, 123 N. J. L. 442 (E. & A. 1939).

The tax assessor is not granted an unlimited discretion. It is perfectly obvious that as a practical matter the legislature could not fix a detailed standard regulating the manner by which the exclusions, exemptions and deductions should be scaled down, which standard could operate with precision under all the possible variations that could be presented in the corporate organization, investment portfolios, properties owned and policy liabilities of the stock insurance companies subject to taxation under the act.

The judgment of the former Supreme Court is reversed and that of the Division of Tax Appeals affirmed.

APPENDIX "B"

(Filed July 23, 1948)

NEW JERSEY SUPREME COURT, MAY TERM, 1948

No. 271

Argued May 5, 1948; Decided July 23, 1948

On Certiorari

Before Justices Bodine and Heher

For the prosecutor: Charles B. Niebling.

For the defendant City of Newark: Thomas L. Parsonnet; Vincent J. Casale, of counsel.

The Opinion of the Court was Delivered by Heher, *J.*:

The question for decision is the validity of an assessment for taxation on intangible personal property of prosecutor, a stock insurance company, levied for the year 1945 by the City of Newark under R.S. 54:4-22, as amended by ch. 245 of the Pamphlet Laws of 1938.

The levy was in the sum of $75,700., or 15% of the sum of the company's paid-up capital and surplus in excess of liabilities and certain reserves for taxes, unearned premiums, losses, and so on. The capital and surplus upon which the assessment was made included on the assessing date bonds issued by the United States in the total sum of $451,682.25; and it is contended that section 54:4-22, cited supra, is "in contravention of the Constitution and laws of the United States," in that the proviso incorporated by the amendment of 1938, cited supra, fixing a minimum assessment at the rate of 15% of the paid-up capital and surplus in excess of liabilities, served to impose a direct tax upon the bonds issued by the Federal government included in the capital and surplus account.

Stocks, bonds, Treasury notes, and other obligations of the United States are "exempt from taxation by or under State or municipal or local authority." 31 U. S. C. A.

Section 742; R. S. 54:4-3. Vide *Howard Savings Institution* v. *Newark*, 63 N.J.L. 547. The exemption does not now extend to interest upon obligations, or dividends, earnings, or other income upon shares, certificates, stock, or other evidences of ownership, or gain from the sale or other disposition of such obligations and evidences of ownership issued on or after March 28th, 1942, by the United States or any agency or instrumentality thereof. Ch. 147 of the Public Laws of 1947; 61 Stat. 180; 31 U.S.C.A., section 742a.

The tax imposed by section 54:4-22, as amended, is not an excise, but an *ad valorem* tax on personal property. It is comprehended under this heading in the Revised Statutes. The tax is levied "upon the full amount or value" of the company's property (exclusive of real estate and tangible personal property, which are to be separately assessed and taxed where located, all shares of stock owned by the company, and nontaxable and exempt property), less "all debts and liabilities certain and definite as to obligation and amount," and all reserves for taxes and a fixed proportion of the reserves for "unearned premiums, losses and other liabilities;" *provided* the assessment against the "intangible personal property" shall "in no event be less than 15% of the sum of the paid-up capital and surplus in excess of the total of all liabilities of such company," as stated in the company's annual statement for the preceding calendar year filed with the State Department of Banking and Insurance, after deduction "from such total of capital and surplus" of the amount of all tax assessments against real estate standing in the company's name.

Thus, there is no specific provision here for the exclusion of stocks, bonds, and other obligations of the United States from the base paid-up capital and surplus in the calculation of the statutorily fixed minimum assessment on intangible personal property; but this provision and section 54:4-3 are in *pari materia* and are therefore to be construed and effectuated as one enactment. So viewed, the legislative command is to exclude the Federal securities in reckoning the capital and surplus upon which the tax

is assessable. It was not within the State legislative province to nullify the exemption from taxation of Federal obligations of this class arising from Federal law. If 15% minimum assessment imposes, as it does here, what is in fact a tax upon the exempt Federal securities, it is in contravention of Federal law and therefore invalid. It is not to be presumed that the Legislature intended to exceed its powers; quite the contrary. To tax the fund composed of exempt property is to tax such exempt property itself. *Newark City Bank* v. *Newark*, 30 N.J.L. 13; *Fidelity Trust Co.* v. *Board of Equalization of Taxes*, 77 N.J.L. 128. A statute is to be construed as a whole with reference to the entire system of which it forms a part, and effectuated in accordance with what reasonably seems to be the legislative intention. Statutes constituting a system should be so construed as to make the system consistent in all its parts and uniform in its operation. *Lewis' Sutherland Statutory Construction* (2 ed.) section 443. This interpretive principle was applied in the analogous case of *Federal Trust Co.* v. *Board of Equalization of Taxes*, supra. A construction should be adopted which, if reasonable, will uphold the enactment rather than one which will defeat it.

And, even though the legislative intention be otherwise, the particular invalid provision is severable and the remainder stands unimpaired; and so the sum of the Federal securities is deductible from the amount of capital and surplus in the ascertainment of the minimum tax. There is not that interdependence of provision which invalidates the whole. There is no hint of the indissoluble connection in legislative intent which would raise the inference that the legislative authority would not have enacted the one without the other. The excision of the invalid part of the statute under review, if such it be, will advance the essential legislative intent. The limitation thus imposed is a minor deviation which obviously is not of the essence of the statutory scheme and inseparable from it so that failure of the one provision in part would serve to nullify the whole enactment. The acceptance of the contrary view would frustrate the legislative will; and this is not of the judicial function.

The judgment of the Division of Tax Appeals sustaining the assessment is reversed; and the cause is remanded for further proceedings not inconsistent with this opinion.

Filed Jun. 6, 1949. Charles K. Barton, Clerk.

A true copy.

Charles K. Barton, Clerk.

Brief for Appellant

Supreme Court of the United States

OCTOBER TERM, 1949

No. 147

NEW JERSEY REALTY TITLE INSURANCE COMPANY,
Appellant,

v.

DIVISION OF TAX APPEALS IN THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW JERSEY, and the CITY OF NEWARK.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF FOR APPELLANT

H. GARDNER INGRAHAM,
WALTER GORDON MERRITT,
CHARLES B. NIEBLING,
Attorneys for Appellant.

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BRIEF FOR APPELLANT

Opinions Below

The opinion of the Supreme Court of New Jersey (R. 23-28) is reported in 1 N. J. 496, 64 A. 2d 341. The opinion of the former New Jersey Supreme Court (R. 19-21) is reported in 137 N. J. L. 444, 60 A. 2d 265.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered March 7, 1949 (R. 28-29). The petition for allowance of an appeal to this Court was presented to, and the

order allowing appeal was signed by, Mr. Justice Burton, on June 2, 1949 (R. 30-34). On October 10, 1949, this Court noted probable jurisdiction and ordered the case transferred to the summary docket (R. 37). The statutory provision which sustains the jurisdiction of this Court to review upon appeal the judgment appealed from herein is Title 28, United States Code, Section 1257(2).

Questions Presented

1. Whether a tax statute of New Jersey providing, so appellant contends, for a property tax, as applied to authorize a minimum assessment against appellant's intangible personal property of not less than 15% of appellant's paid-up capital and surplus, violates the Borrowing Clause (Art. I, Sec. 8, Cl. 2) and the Supremacy Clause (Art. VI, Cl. 2) of the Constitution of the United States, in so far as such capital and surplus were computed without any exclusion or deduction of, or any apportionment on account of, United States Treasury Bonds and accrued interest thereon owned by appellant and comprising more than half its total assets.

2. Whether the New Jersey statute, as so applied, violates Section 3701 of the Revised Statutes of the United States and the Supremacy Clause (Art. VI, Cl. 2) of the Constitution of the United States by taxing obligations of the United States which Section 3701 exempts from taxation by or under state or municipal or local authority.

3. Whether, as a question involved in determining the above questions so far as they pertain to the accrued interest on appellants bonds, the Public Debt Act of 1941 as amended (55 Stat. 9, 56 Stat. 190, 61 Stat. 180; 31 U. S. C. A. § 742a), authorizes state or municipal taxation of the interest on appellant's United States Treasury Bonds issued after March 28, 1942.

New Jersey Statute, the Validity of Which is Involved

The state statute, the validity of which—the proviso clause in particular—as applied to the United States Treasury Bonds owned by appellant is challenged, is Section 54:4-22 of the Revised Statutes of New Jersey, 1937, as amended by Chapter 245 of the Pamphlet Laws of 1938. The statute, as so amended, is found at pages 550-551 of the Revised Statutes, Cumulative Supplement of New Jersey containing the Laws of 1938, 1939 and 1940.

Shown in its context, the statute provided:

"Title 54. TAXATION

Subtitle 2. TAXATION OF REAL AND PERSONAL PROPERTY IN GENERAL:

Chapter 4. ASSESSMENT AND COLLECTION OF TAXES.

Article 4. ASSESSMENT OF PERSONAL PROPERTY.

54:4-22. Taxation of stock insurance companies. Every stock insurance company organized under the laws of this state, other than a life insurance company, shall be assessed and taxed in the taxing district where its office is situated, upon the full amount or value of its property (exclusive of real estate and tangible personal property, which shall be separately assessed and taxed where the same is located, and exclusive of all shares of stock owned by such insurance company and exclusive of nontaxable property and of property exempt from taxation), deducting from such amount or value all debts and liabilities certain and definite as to obligation and amount, and the full amount of all reserves for taxes, and such proportion of the reserves for unearned premiums, losses and other liabilities as the full amount or value of its taxable intangible property bears to the full amount or

value of all its intangible property; provided, however, the assessment against the intangible personal property of any stock insurance company subject to the provisions of this section shall in no event be less than fifteen per centum of the sum of the paid-up capital and the surplus in excess of the total of all liabilities of such company, as the same are stated in the annual statement of such company for the calendar year next preceding the date of such assessment and filed with the department of banking and insurance of the state of New Jersey, after deducting from such total of capital and surplus the amount of all tax assessments against any and all real estate, title to which stands in the name of such company.

The capital stock in any such company shall not be regarded for the purposes of this act [section] as a liability and no part of the amount thereof shall be deducted, and the person or persons or corporations holding the capital stock of such company shall not be assessed or taxed therefor. No franchise tax shall be imposed upon any insurance company included in this section."

Chapter 132, Section 10, of the Laws of 1945, which became effective on April 10, 1945 (subsequent to the levy of assessment herein), amended the foregoing statute by deleting the last sentence. The statute, so amended, is found at page 708 of the Revised Statutes Cumulative Supplement of New Jersey containing the Laws of 1945, 1946, 1947. See Appendix "A", *infra*, pages 39-40.

Pertinent Other Statutes of New Jersey

Section 54:4-1 of the Revised Statutes of New Jersey, as amended in 1942 and 1943, and as found at pages 462-463 of the Revised Statutes Cumulative Supplement of New Jersey containing the Laws of 1941, 1942 and 1943, provided:*

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* See next footnote.

"54:4-1. Property subject to tax; date of assessment. All property, real and personal within the jurisdiction of this state not expressly exempted from taxation or expressly excluded from the operation of this chapter shall be subject to taxation annually under this chapter at its true value, and shall be valued by the assessors of the respective taxing districts. Property omitted by the assessors may be assessed as hereinafter provided. All property shall be assessed to the owner thereof with reference to the amount owned on October first in each year, and the person so assessed for personal property shall be personally liable for the taxes thereon."

Section 54:4-3 of the Revised Statutes of New Jersey provided at the time of the assessment herein:*

"54:4-3. Exemption of U. S. securities. The bonds and other securities of the United States, other than circulating notes of national banking associations and the United States legal tender notes and other notes and certificates of the United States, payable on demand and circulating or intending to circulate as currency, and gold, silver or other coin shall be exempt from taxation under this chapter."

Pertinent other statutes of the State of New Jersey are set forth in the appendix, *infra*, pages 35-40.

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* Chapter 163, §§ 1 and 2, respectively, of the Laws of 1945, effective April 13, 1945, amended Section 54:4-1, *supra*, and repealed Section 54:4-3; *supra*; but said chapter is inapplicable herein by virtue of § 9 thereof, which provided, in substance, that the chapter should not apply in instances of assessments levied prior to April 13, 1945. See *infra*, p. 35, and R. S. Cum. Supp. N. J., 1945, §§ 54:4-1, 54:4-1.1 and 54:4-3, pp. 705-706. The assessment date herein was October 1, 1944, *infra*, p. 7.

Federal Constitutional and Statutory Provisions Involved

Article I, Section 8, Clause 2 of the Constitution of the United States provides:

> "The Congress shall have Power. . . .
> To borrow Money on the credit of the United States;"

Article VI, Clause 2 of the Constitution of the United States provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 3701 of the Revised Statutes of the United States (U. S. C., Title 31, Sec. 742) provides:

> "Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority."

Section 4 of Chapter 7 of the Public Debt Act of 1941, 55 Stat. 9, as amended (U. S. C. Title 31, Sec. 742a.) is set forth in Appendix "A", *infra*, page 40.

Statement

Appellant is, and during the tax year 1945 was, a stock insurance company organized under the laws of New Jersey, and having its office and owning property situate in the City and taxing district of Newark, County of Essex, New Jersey (R. 1, 4, 15).

Appellant filed its property tax return for 1945 under the statute herein challenged on the printed form furnished by the City of Newark entitled "PERSONAL PROPERTY RETURN OF STOCK INSURANCE COMPANY FOR YEAR 1945 UNDER SECTION 54:4-22 OF REVISED STATUTES" (R. 6-10). The balance sheet and schedules included in the return were as at September 30, 1944, which was the day prior to the assessing date for the 1945 assessment.* The items appearing from the return and herein pertinent, may be shown, in summary, as follows:

Total assets		$774,972.98
Total intangible assets		$774,972.98
Property to be excluded under the formula contained in the first portion of the statute:		
United States Treasury Bonds purchased in 1941, 1942 and 1943 (book value)	$450,000.00	
Accrued interest on above Bonds	$ 1,682.25	
Various other exempt or non-taxable properties	$318,771.95	$770,454.20
Total taxable intangibles		$ 4,518.78
Deductions to be made under said formula:		
Debts and liabilities certain	$ 25,756.63	
Reserves for taxes	$ 28,175.46	
Proportion of reserves for losses	$ 758.13	$ 54,690.22
Assessment under said formula		NONE

* N. J., R. S. 54:4-35 (Appendix "A", *infra*, p. 37) provides that the assessor shall begin the work of assessment on October 1 in each year and complete the work and file his complete assessment list by January 10 following. Under the practice, the assessment date is October 1 preceding the tax year.

Appellant's capital stock and surplus, as shown on the balance sheet, were: Capital Stock $250,000; Paid in Surplus $250,000; Profit and Loss Surplus $81,300.94 (R. 7).

The accuracy of the foregoing and all other figures shown on appellant's return has been conceded (R. 13), and there is no issue as to assessment under the formula contained in the first portion of the statute. Appellant concededly was not assessed thereunder, but under the proviso clause (R. 13, 18).

The only item appearing on the return which related to the proviso clause was (R. 6):

> "12. MINIMUM ASSESSMENT (15% of sum of Capital and Surplus after deducting Real Estate Assessments and other Tax Exempt and Non-Taxable Securities. Use last annual statement)."

Appellant's response to this item was "NONE". The record does not show whether this response was based on appellant's views as to the unconstitutionality of the proviso clause, or whether on miscalculations or on any claimed deduction additional to deduction of appellant's United States Treasury Bonds and the accrued interest thereon. Appellant's annual statement filed with the State Department of Banking and Insurance for the calendar year 1943 showed paid-up capital $250,000 (R. 17), paid-in surplus $250,000 (id.), earned surplus $47,462.93 (id.), total liabilities $50,463.23 (id.) and United States Treasury Bonds aggregating, with accrued interest, $452,526.06.*

If deduction or exclusion of the Bonds and interest were proper under the proviso clause, it appears now that, while

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* This figure does not appear in the record, but has been furnished to counsel. The record does disclose, however, that of the $450,000.00 Bonds owned by appellant on September 30, 1944, most had been purchased in 1941 and 1942, and the remainder on April 28, 1943 (R. 9).

some assessment could be levied under the clause, such assessment could not exceed $14,240.53.*

The City of Newark, acting under the proviso clause, levied an assessment of $75,700.00 against appellant's intangible personal property for the year 1945 (R. 2, 12). The computation by which this amount of assessment was arrived at does not appear in the record. But it is conceded in the record (R. 13, 18), and it was conceded by

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* This maximum figure results as below shown if the words "in excess of the total of all liabilities" appearing in the proviso clause are construed as being redundant rather than as authorizing liabilities to be deducted from the sum of the paid-up capital and surplus before applying the 15%.

Paid-up capital		$250,000.00
Surplus		
Paid-in surplus	$250,000.00	
Earned surplus	$ 47,462.93	$297,462.93
Sum of paid-up capital and surplus (in other words, Net Worth)		$547,462.93
Less: United States Treasury Bonds and accrued interest		$452,526.06
		$ 94,936.87
Less: Real estate assessments		None
		$ 94,936.87
Assessment—15% × $94,936.87 =		$ 14,240.53

If literal effect were given the words "in excess of the total of all liabilities", the permissible assessment would be reduced to $6,671.05, since the 15% would then be applied not to the net-worth of $94,936.87, but to that figure less the total actual liabilities of $50,463.23. Such literal interpretation, while not foreclosed by any state court decision addressed to the point, would be inconsistent with the statement of the Supreme Court of New Jersey in its present opinion that the tax is upon net worth (R. 26, 27). It would conflict also with the administrative interpretation and practice.

counsel for the City of Newark in the court below,* that the City purported to base its assessment on the figures shown in appellant's return, and that in computing the sum of the paid-up capital and surplus the City did not deduct or exclude, but included the value of the Bonds and accrued interest owned by appellant.

Appellant paid the tax** which was levied by the City on the basis of the $75,700 assessment, but appealed the assessment to the Essex County Board of Taxation on the ground that the statute, as so applied, was unconstitutional (R. 5). The Board decided that the appeal should be made to another tribunal in order that the constitutional question might be determined (R. 5). Appellant thereupon appealed the assessment to the Division of Tax Appeals in the State Department of Taxation and Finance, an appellee herein (R. 4-10). Appellant contended on this appeal that the statute as applied was unconstitutional in that the proviso clause operated to impose a direct tax upon bonds of the United States in violation of the principle established by this court in *McCulloch* v. *Maryland*, 4 Wheat. 316, and subsequent decisions, and in violation also of Section 3701 of the Revised Statutes of the United States (R. 12, 14-15). An additional ground of unconstitutionality asserted on that appeal, but not now urged, was that the statute embodied an arbitrary classification resulting in discriminatory taxation contravening the Fourteenth

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* The Brief submitted in behalf of the City of Newark in the court below, stated (at p. 2):

> "The appellant, the taxing district of the City of Newark, levied an assessment of $75,700.00 upon the personalty of the prosecutor for the year 1945—which is 15% of the paid-in capital and surplus—in accordance with the above statute."

** The record does not show the amount of the tax. Counsel is advised that the City of Newark tax rate for 1945 was $5.16 per hundred dollars assessment and that $3,906.12 was the amount of the tax paid by appellant.

Amendment of the Constitution of the United States, as well as the Constitution of New Jersey (R. 15).

On April 22, 1947, after hearing before two Commissioners, the Division rendered judgment dismissing the appeal (R. 11). The Commissioners' report stated (R. 10, fol. 14):

> "This is a personal property appeal wherein the petitioner attacks the constitutionality of the assessment. This is not a proper court for the determination of such a question, and therefore it is recommended that the appeal be dismissed."

No other opinion was rendered by or on behalf of the Division.

On August 3, 1948, on writ of certiorari, the then established New Jersey Supreme Court reversed the judgment of the Division of Tax Appeals and remanded the cause to the Division to fix the amount of the assessment in accordance with the court's opinion (R. 22). The court held that the Bonds owned by appellant were to be deducted in computing capital and surplus assessable under the proviso clause, since the clause was *in pari materia* with section 54:4-3 (quoted, *supra*, p. 5) and since if it were not construed as requiring or permitting deduction for the Bonds it would contravene Federal law (R. 20-21). The opinion stated, *inter alia* (R. 20):

> "The tax imposed by section 54:4-22, as amended, is not an excise, but an *ad valorem* tax on personal property" (fol. 27).
>
> * * * * * *
>
> "* * * If 15% minimum assessment imposes, as it does here, what is in fact a tax upon the exempt Federal securities, it is in contravention of Federal law and therefore invalid. * * * To tax the fund composed of exempt property is to tax such exempt property itself" (fol. 28).

Referring to the exemption enacted by Congress in R. S. § 3701 (31 U. S. C., § 742, quoted, *supra*, p. 6) and to the provisions of 31 U. S. C., § 742a (quoted, *infra*, p. 40), the opinion expressed the view that such exemption does not extend to interest upon United States obligations issued on or after March 28, 1942 (R. 19-20). The opinion did not mention whether the Constitution prohibits such interest from being taxed by or under the authority of a state. Nor did it or the judgment refer specifically to the accrued interest on appellant's Bonds.

On appeal by the City of Newark to the New Jersey Court of Errors and Appeals (R. 22-23), the successor of that court, namely, the present Supreme Court of New Jersey, reversed the judgment of the former New Jersey Supreme Court and upheld the statute as applied (R. 23-29). The court's opinion includes the following sentences which summarize its conclusions:

> "We have concluded that the tax levied under this statute is not an ad valorem tax or property tax but rather is a valid tax upon the net worth of the company even though there be included in the calculation of the net worth certain exempt federal securities or their income" (R. 26, fol. 35).
>
> * * * * * *
>
> "If the assessment is made without discrimination then it makes no difference whether the corporate property which is the result [sic] of the tax may chance to include federal exempt securities. The constitutional power of one government to reach a permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon such securities. *Educational Films Corp.* v. *Ward*, [282 U. S. 379] supra, at 389.
>
> "This seems to be the applicable rule whether the taxing statute is a franchise tax or a tax upon the net worth of the company, which latter we hold the tax under the statute before us to be. * * *" (R. 27, fol. 37).

The opinion nowhere called the tax an excise or a franchise or other indirect tax. It cited no authority for the proposition that the rule applicable to a tax upon franchise applies as well to a tax upon net worth.

Specification of Assigned Errors to Be Urged

1. The Supreme Court of New Jersey erred in holding and deciding that Title 54, Chapter 4, Section 22 of the Revised Statutes of New Jersey, as amended in 1938 (R. S. Cum. Supp. 54:4-22 * * *) did not violate Article I, Section 8, Clause 2 of the Constitution of the United States in so far as said statute was applied to authorize the tax assessment by the City of Newark for the year 1945 on property of appellant without excluding the United States Treasury Bonds held by appellant from the property so assessed.

2. The Supreme Court of New Jersey erred in holding and deciding that the said statute of New Jersey did not violate the Supremacy Clause contained in the second paragraph of Article VI of the Constitution of the United States in so far as said statute was applied to authorize the said tax assessment on appellant's property without excluding said United States bonds from the property so assessed.

3. The Supreme Court of New Jersey erred in holding and deciding that the said statute of New Jersey did not violate Section 3701 of the Revised Statutes of the United States (31 U. S. C. A. § 742) in so far as said state statute was applied to authorize the said tax assessment on appellant's property without excluding said United States bonds from the property so assessed.

4. The Supreme Court of New Jersey erred in failing to hold and decide that, by virtue of Article I, Section 8, Clause 2, and the Supremacy Clause of Article VI of the

Constitution of the United States, the said United States bonds could not validly be included as part of appellant's paid-up capital or surplus in computing the assessment under the proviso clause of the said statute of New Jersey.

5. The Supreme Court of New Jersey erred in failing to hold and decide that Section 3701 of the Revised Statutes of the United States (31 U. S. C. A. § 742), in conjunction with the Supremacy Clause of Article VI of the Constitution of the United States, prohibited the said United States bonds from being included as part of said capital or surplus of appellant in computing said assessment.

6. The Supreme Court of New Jersey erred in holding and deciding that the tax assessed under the authority of the said statute was not an ad valorem or property tax within the scope of the decisions of the Supreme Court of the United States holding that United States bonds are exempt from such tax by or under state, municipal or local authority.

8. The Supreme Court of New Jersey erred in reversing the judgment of the former New Jersey Supreme Court.

Summary of Argument

I

The decision below is in flat conflict with a number of decisions of this Court involving state statutes laying or authorizing a tax similar to the instant, upon corporate capital or surplus or upon a valuation measured by either or both. *Bank of Commerce* v. *New York City*, 2 Black 620 (1863), and later cases discussed, *infra*, pages 19-21. This Court has held uniformly in these cases that the Borrowing and Supremacy Clauses of the Constitution impliedly

forbid inclusion of the value of bonds and similar obligations of the United States owned by the corporation in computing the capital, surplus or valuation assessed. The tax in each instance was held to be an unconstitutional property tax upon the Government bonds or other obligations to the extent that their value was included in the calculation, whether or not the state courts regarded the tax as a property tax or as being imposed on the bonds or other obligations.

These decisions have not been reversed or modified. Nor has their continuing validity been questioned in any of the opinions of this Court in cases which have relaxed the doctrine of implied intergovernmental tax immunities with respect to various income, franchise, excise or other so-called indirect taxes.

The conclusion of the Supreme Court of New Jersey and the contention of appellees, that the present tax is not an ad valorem or property tax, is plainly untenable; and in deciding the Federal questions herein, this Court is not bound or limited by such conclusion below. (*United States* v. *Allegheny County*, 322 U. S. 174, 184, and other decisions cited, *infra*, p. 17.) The characterization of the tax as being "upon the net worth of the company" (R. 26, 27) is, in any event, the equivalent of stating that it is a tax upon the paid up capital and surplus. As such, it is indistinguishable from the taxes above referred to which have been held unconstitutional by this Court.

The tax has not been, and properly cannot be called a franchise tax, since it operates without regard to whether the corporation does business or exercises any other privilege. Cf. *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 388. By its plain terms and context, as well as by the method of local assessment and administration, the statute provides for a property tax.

II

The New Jersey statute, as applied, is unconstitutional under the Supremacy Clause for the additional or separate reason that it violates the express prohibition enacted by Congress in Section 3701 of the Revised Statutes of the United States. *Bank* v. *Supervisors*, 2 Wall. 26. See *Smith* v. *Davis*, 323 U. S. 111.

The legislative history of Section 3701 affords no ground for doubt that the statutory exemption was intended to be at least co-extensive with the constitutional exemption implied by this Court in the *Bank of Commerce* and other cases determined by this Court during the Civil War era. That broad scope must be given the statutory exemption is, if anything, reinforced by the fact that there has been no modification of the Section except the very limited one which was enacted in the Public Debt Act of 1941 permitting income from Government securities to be taxed by the Federal Government but not the States.

III

The statement contained in the opinion of the former New Jersey Supreme Court (R. 19-20) to the effect that the Public Debt Act of 1941, as amended, permits taxation of the interest on United States Bonds by States, or under State authority, is erroneous. The title of the Public Debt Act of 1941, and even more clearly the legislative history of the Act and the minor amendments since adopted, show that it authorizes only Federal taxation of such income. A holding to that effect is called for herein to insure proper disposition on remand.

Argument

I

The proviso of the New Jersey statute, as applied, infringes the Borrowing and Supremacy clauses of the Federal Constitution by taxing, without any consent of Congress, bonds issued by the United States

This Point is sustained by (A) a summary of decisions of this Court, which establish that a state or municipal property, as distinct from excise or privilege, tax upon corporate capital and/or surplus, or upon a valuation measured by either or both, violates the above clauses of the federal Constitution to the extent that bonds or similar obligations of the United States are included in the calculation of such capital and/or surplus; and (B) an analysis of the New Jersey statute and the assessment herein, which shows that, in operation and law, the tax imposed is a property tax within the scope of this Court's decisions.

The fact that the Supreme Court of New Jersey stated in its opinion that the tax "is not an *ad valorem* tax or property tax but rather is a valid tax upon the net worth" (R. 26), does not, quite apart from the obvious *non-sequitur*, preclude this Court from determining, or in any way limit this Court in determining, the true character of the tax for purposes of deciding the Federal questions. *United States* v. *Allegheny County*, 322 U. S. 174, 184; *Schuylkill Trust Co.* v. *Penna.*, 296 U. S. 113, 119; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 280. *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 387; and decisions discussed *infra*, pages 18-21. The rule is that "the descriptive pigeonhole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction." *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, at 443.

A. Summary of Pertinent Decisions

The basic constitutional principle involved in this case, is, of course, the principle expounded in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819) and *Osborn* v. *United States Bank*, 9 Wheat. 738 (1824), that the properties, functions and instrumentalities of the federal Government are immune from taxation by or under state authority, at least in the absence of consent of Congress. There is no such consent here, but the opposite, as shown in Point II.

The decision in *Weston* v. *City Council of Charleston*, 2 Pet. 499 (1829), established that the *McCulloch* principle applies to state or municipal taxation of bonds or similar obligations of the United States. The Court held that an ordinance, construed by the majority as imposing a property tax on a personal estate consisting of United States stock, violated the Borrowing Clause (*supra*, p. 6) and the Supremacy Clause (*id.*) of the Constitution of the United States. The Court's opinion, written by Chief Justice Marshall, declared (at 465) that, of the various operations of government:

> "No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United States. No power has been conferred by the American people on their government, the free and unburdened exercise of which more deeply affects every member of our republic."

and that (at 468):

> "The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence, depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely."

Although the ordinance in the *Weston* case subjected the United States obligations to taxation *eo nomine* and could have been regarded as discriminating against them, the opinion makes clear that the holding was not rested on those narrow grounds. Subsequent decisions have confirmed this interpretation and settled that the holding applies in cases similar to the instant. *Bank of Commerce* v. *New York City*, 2 Black 620 (1863); *Bank Tax Case*, 2 Wall. 200 (1864); *The Bank* v. *The Mayor*, 7 Wall. 16 (1868); *Farmers Bank* v. *Minnesota*, 232 U. S. 516 (1914).

The *Bank of Commerce* case involved a New York statute under which a municipal tax assessment was levied on the actual value of the bank's capital stock. The value of the bank's real estate was deducted in computing the value of the stock, but the bank's investment in United States stocks, bonds and securities was not deducted. The Tax Commissioners in making the assessment stated that it was "not an assessment upon such public debt, but upon bank capital" (2 Black at 621). Basing their decisions on an earlier decision* of the Court of Appeals of New York which had interpreted the *Weston* case as being inapplicable to a non-discriminatory tax not *eo nomine* upon obligations of the United States, the state courts had upheld the assessment in so far as it reflected the value of United States stocks, bonds and securities issued after, and not contracted for prior to, the Act of Congress of February 25, 1862, which provided for exemption (26 N. Y. 163, 164). This Court reversed. In a unanimous opinion, it held that the effect of the assessment upon capital was to tax the obligations of the United States con-

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* *The People, ex rel. The Bank Of The Commonwealth* v. *The Commissioners of Taxes and Assessments*, 23 N. Y. 192, 205-209. The decision was reviewed and overruled by this Court contemporaneously with the decision in the *Bank of Commerce* case. 2 Black 635.

trary to the *McCulloch* and *Weston* decisions. The Court expressly recognized (at 629) that there was no feature of discrimination in the New York statute or assessment and that the *Weston* decision was not based on the presence of such a feature in that case.

As a result of the *Bank of Commerce* decision by this Court, New York amended its statute to tax banks, not on the actual value of their capital, but "on a valuation equal to the amount of capital stock paid in, or secured to be paid in, and their surplus earnings * * *." A tax based upon such a valuation computed without excluding capital invested in United States stock, was involved in the *Bank Tax Case, supra.* This Court unanimously reversed the Court of Appeals' decision that the statute did not tax the stock and was constitutional as applied. In so doing, the Court overruled the argument made to it on behalf of the City, that the tax was not a property tax, but was a franchise tax and that the valuation provided for in the statute was only to fix the amount of such franchise tax. (See 2 Wall. 200, at 201-202.)

The *Bank Tax Case* was unanimously followed in *The Bank* v. *The Mayor, supra,* which held that United States certificates of indebtedness were unconstitutionally included in computing valuation under the amended New York statute.

Another decision which would need to be overruled if the judgment below were to be affirmed is that in the *Farmers Bank* case, *supra.* Essentially identical with the tax herein, the tax there was on surplus of assets, other than real estate, in excess of deposits and other accounts payable. In computing the assets, bonds of municipalities in federal territory were included. As here, the state contended, and the state court held, that there was no tax upon the bonds as property. But this Court unanimously overruled such contention and reversed the judgment. The opinion stated (232 U. S. at 528):

"It is, however, further suggested that the judgment under review does not sustain a tax upon the bonds as property, but only a tax upon the surplus of the Savings Bank, computed by taking into account all of its assets, amounting to about $12,000,000, of which the bonds were only about $700,000, and deducting therefrom its liabilities. But as the surplus is treated as property and taxed as such, it is obvious that some portion of the burden of the tax is attributable to the ownership of the municipal bonds. * * *"

"It results that the inclusion of the bonds now in question in the list of assets of plaintiff in error, in ascertaining its surplus for the purpose of imposing a state property tax thereon, was repugnant to the Constitution of the United States."

Neither the *Farmer's Bank* decision, nor any of this Court's other decisions above described commencing with *Bank of Commerce*, has been overruled or modified. So far as counsel has discovered, they have never been questioned in any opinion or dissent in this Court. To the extent that any departure from them has been claimed to have occurred in this Court, such departure was an extension and occurred in *Missouri* v. *Gehner*, 281 U. S. 313. However, contrary to the apparent supposition of the Supreme Court of New Jersey (R. 26), appellant does not particularly rely upon that decision and does not need to do so.

The tax in *Missouri* v. *Gehner* was upon net value of the personal assets of insurance companies in excess of legally required reserves and any unpaid policy claims. Unlike the situation here, the United States bonds owned by the company had been deducted in computing its taxable assets (281 U. S. at 318-319, 321). The question before this Court arose from the fact that, in arriving at the final net value taxed, the state court had not allowed deduction of the full amount of the legal reserves and unpaid policy claims, but deduction only of a lesser amount

based on the proportion that the taxable assets bore to all the assets. This Court reversed on the ground that, while the statute might validly have permitted no reduction at all on account of reserves or policy claims, it could not make ownership of Government bonds the basis of denying the full reduction to which owners of other personalty were entitled. The majority opinion concluded as follows (at 322):

> "It is clear that the value of appellant's government bonds was not disregarded in making up the estimate of taxable net values. That is in violation of the established rule. *Nat'l Life Ins. Co.* v. *United States, supra* [277 U. S. 508]; *Northwestern Ins. Co.* v. *Wisconsin*, 275 U. S. 136; *Miller* v. *Milwaukee*, 272 U. S. 713."

The decision was applied in *Schuylkill Trust Co.* v. *Penna.*, 296 U. S. 113, 119. Indeed, it was there extended.

If it were assumed that the holding in *Missouri* v. *Gehner* would not be followed in a like situation to-day and that the dissenting opinion per Mr. Justice Stone would be preferred, appellant's case herein would not be weakened, since appellant's Bonds were not deducted in computing its capital and surplus under the proviso (*supra*, pp. 9-10). The dissenting opinion itself stated that, while tax-exempt securities may be part of net worth, "net worth thus computed should be held subject to the state tax *except insofar as tax exempt securities contribute to it*". (281 U. S. at 327). (Emphasis added.)

The Supreme Court of New Jersey relied on decisions of this Court upholding non-discriminatory state franchise taxes measured by property or income including Government bonds or income therefrom. *Educational Films Corp.* v. *Ward*, 282 U. S. 379; *Tradesmen's Bank* v. *Tax Comm'n*, 309 U. S. 560. But these decisions have not undermined the *Bank of Commerce* line of decisions involving property taxes. This has been clear ever since

Society For Savings v. *Coite*, 6 Wall. 594. Franchise taxes are taxes upon the exercise of a privilege, rather than upon the right of ownership. As was stated in the Court's opinion written by Mr. Justice Stone in *Pacific Co.* v. *Johnson*, 285 U. S. 480, at 490:

> "• • • It suffices to say that the tax immunity extended to property *qua* property does not embrace a special privilege, the corporate franchise, otherwise taxable, merely because the value of the corporate property or net income is included in an equable measure of the enjoyment of the privilege. The owner may enjoy his exempt property free of tax, but if he asks and receives from the state the benefit of a taxable privilege as the implement of that enjoyment, he must bear the burden of the tax which the state exacts as its price."

The same reasoning differentiates the *Bank of Commerce* line from decisions* involving transfer taxes, excise taxes, and various other so-called indirect taxes measured in part by exempt securities. *Plummer* v. *Coler*, 178 U. S. 115, 126-134. See *Hale* v. *State Board*, 302 U. S. 95, 109.

The distinction between a tax on corporate capital or surplus, and a tax on shares of stock as property of stockholders, also has long been settled. Decisions upholding the latter kind of tax derived originally from an Act of Congress, and such taxes, even though based on a valuation which reflected the value of exempt securities owned by the corporation, were held constitutional on the ground that the property in the shares, was distinct from the property of the corporation**. Where, however, a state

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* Many of these decisions are collected in *Pacific Co.* v. *Johnson*, *supra*, and *Educational Films Corp.* v. *Ward*, *supra*.

** *Van Allen* v. *Assessors*, 3 Wall. 573; *Peoples National Bank* v. *Board of Equalization*, 260 U. S. 702; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103.

tax ostensibly laid upon shares of the stockholders of a bank was regarded by this Court as being actually laid upon the bank's capital, the *Bank of Commerce* decisions were applied and the state statute held unconstitutional as an infringement of the Borrowing power and as violating R.S. § 3701, insofar as the assessor, in computing the assessment, took into account the bank's capital, surplus and undivided earnings without deducting bonds of the United States owned by it. *Home Savings Bank* v. *Des Moines*, 205 U. S. 503.

If it be urged that a franchise, or excise, or other privilege tax, or a tax upon stockholders' shares, is as much "a clog upon the borrowing power"* as is a property tax, when both are measured by the value of Government securities, the answer has been given by this Court in the case chiefly relied on by the court below. *Educational Films Corp.* v. *Ward*, 282 U. S. 379, at 391 (per Mr. Justice Stone):

> "It is said that there is no logical distinction between a tax laid on a proper object of taxation, measured by a subject matter which is immune, and a tax of like amount imposed directly on the latter; but it may be said with greater force that there is a logical and practical distinction between a tax laid directly upon all of any class of government instrumentalities, which the Constitution impliedly forbids, and a tax such as the present [franchise tax] which can in no case have any incidence, unless the taxpayer enjoys a privilege which is a proper object of taxation, and which would not be open to question if its amount were arrived at by any other non-discriminatory method."

The opinions in this Court's decisions which have relaxed former strict rules of implied immunities, in the

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* The phrase is Mr. Justice Cardozo's, *Hale* v. *State Board*, 302 U. S. 95, at 107.

fields of governmental salaries, government work contractors, and interstate commerce, and of trust, leased or similar government lands, have not criticized or cast doubt upon the validity of the *Bank of Commerce* line of decisions. Nor has any statute similar to R. S. § 3701 been involved in those cases. *Cf. Helvering* v. *Gerhardt*, 304 U. S. 405; *Graves* v. *O'Keefe*, 306 U. S. 466; *O'Malley* v. *Woodrough*, 307 U. S. 277; *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Okla. Tax Comm'n* v. *Texas Co.*, 336 U. S. 342, 367, and cases cited at 359-360.

That the *Bank of Commerce* line of decisions stands intact was attested by the Department of Justice in an exhaustive study published in 1938 entitled "TAXATION OF GOVERNMENT BONDHOLDERS AND EMPLOYEES."* This Court's more recent decision in the Mesta Co. case (*United States* v. *Allegheny County*, 322 U. S. 174) impliedly attests the same. Although that case did not involve a tax upon capital or surplus, it is persuasive authority herein. The holding that the leased Government machinery was subjected to an unconstitutional property tax in that its value was included in the valuation of the private real estate taxed, is especially relevant because the state court had concluded that the tax was laid only on the real estate. See 322 U. S. at 180, 183-185.

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* The Department's study was occasioned by President Roosevelt's message to Congress favoring legislation relaxing intergovernmental tax immunities. Although it questioned the soundness of a number of this Court's decisions involving other kinds of taxes, it did not question the *Bank of Commerce* line other than the extension in *Missouri* v. *Gehner, supra*. It stated (pp. 24-25):

> "The Court has many times considered the validity of taxes imposed upon the 'capital' or the 'assets' of corporations. In each of the cases it has held the tax invalid unless provision were made for deducting the value of government bonds held by the corporation. Whatever the measure of taxation which is adopted, if the Court concludes that it is in effect imposed upon the property held by the corporation, the value of its government bonds must be deducted. * * *"

(B) The New Jersey Tax Involved Is a Property Tax Within the Scope of This Court's Decisions

The conclusion of the Supreme Court of New Jersey, and the contention of the appellees, that the New Jersey statute does not impose a property tax within the meaning of this Court's decisions, cannot be supported.

It overlooks the close similarity between the proviso clause of the New Jersey statute and the statutes involved in the *Bank of Commerce* line of cases. It does not explain how a tax said in the opinion below to be "upon the net worth of the company" (R. 26, 27) could be other than a property tax when such net worth is comprised of the paid-up capital and surplus and when the tax is not, and was not called in the opinion, a franchise, excise, privilege or any other named tax. And it erroneously fails to give effect to (1) the practical operation of the proviso; (2) its express terms; (3) its context, including the scheme of the New Jersey tax statutes read as a whole, as they should be (*Cf., Pacific Co.* v. *Johnson*, 285 U. S. 480, 495); and (4) its administration.

Decisions earlier cited (pp. 17, 19) have established that, in determining the true character of the tax for purpose of deciding the Federal questions, this Court is not bound or limited by the state court's characterization.

1. *Operation of the proviso:* The most important test of the true character of a tax statute is its practical operation. *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 388; *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 280. Judged by that test, the tax here is a property tax. Cases *supra*, pp. 19-21, 23-24, 25. Unlike in *Educational Films Corp.*, the statute here *has* an "application independent of the corporation's enjoyment of the privilege of exercising its franchise" (282 U. S. at 388). Appellant would be liable for the tax whether or not it did business during the

year. The tax, when levied, is based not on income, but solely on a valuation of property.

The Cities of Camden and Trenton, *amici curiae* in the court below, contended that the proviso does not operate to tax the Bonds, but merely to limit exemptions and deductions otherwise allowable under the formula of the statute (Br., pp. 5-7). But the proviso, as applied, would authorize a tax in the case of a company whose capital and surplus was comprised solely of exempt Government bonds. Such tax, moreover, would be as high as in the case of a company having the same capital and surplus comprised solely of non-exempt intangibles.

2. *Terms of the Statute* (quoted *supra*, pp. 3-4): The formula portion specifies that any company subject to the statute shall be assessed and taxed "upon the full amount or value of its property". The proviso specifies that the assessment "against the intangible personal property" shall be not less than the described minimum. This phraseology is consistent only with a property tax. Also, the last sentence of the section, as it stood at the time of the assessment (*supra*, p. 4), specified that no franchise tax shall be imposed upon any company subject to the section. Neither the court below nor either appellee has asserted that the tax should be regarded as one upon franchise. Nor have they pointed to any particular term as indicating that the tax is not "against the intangible personal property" as the proviso states the assessment to be.

At the time of the assessment herein, the formula portion of the statute, read in conjunction with Section 54:4-3, expressly exempted bonds and other securities of the United States (*supra*, p. 5). If the legislature had not intended the statute to impose a property tax, one may wonder why it provided for this exemption.

3. *Context and Scheme of the Statute:* The title, subtitle, chapter and article headings under which the statute

appears are shown on page 3 of this brief. Each of them is consistent only with the view that the present tax is a property tax and was so intended. The same view is confirmed by reference to Section 54:4-1 (quoted, *supra*, p. 5) and Sections 54:4-2, 54:4-9, 54:4-18, 54:4-35 and 54:4-36 (App. "A", *infra*, pp. 36-37) with which also the present statute (Section 54:4-22) is to be read.

The provisions of Section 54:4-1 are very similar to those which this Court, in *Hale* v. *State Board*, 302 U. S. 95, at 102, called "a mandate clearly addressed to the levy of *ad valorem* taxes only." All ensuing sections in Chapter 4 of Title 54 are in harmony with 54:4-1. Conversely, New Jersey's non-property taxes, including franchise, premium receipts and various other business taxes, are provided for in later chapters and under different subtitles. See App. "A", *infra*, pages 38-40.

Although New Jersey had no franchise tax applicable to appellant at the time of the assessment herein, an equivalent tax was enacted in 1945 (P. L. 1945, c. 132; N. J. R. S. Cum. Supp. 54:18A-1, *infra*, p. 39). It is imposed annually upon taxable premiums, less various amounts including property taxes. Its existence, without any change in the statute here involved other than the deletion of the last sentence thereof (*supra*, p. 4), is still another feature of the statutory scheme of New Jersey inconsistent with any assimilation of the present tax as being other than a property tax. New Jersey should not be held to impose, in effect, two franchise taxes on appellant.

4. *Administration of the Statute:* Prior to the decision of the court below, the administrators of the statute appear to have regarded it as a property tax statute. The former New Jersey Supreme Court so regarded it in his opinion (R. 20-21). By its own terms, it is administered "in the taxing district where [the company's] office is situated", rather than centrally as in the cases of New Jersey's fran-

chise, premium receipts, and similar privilege taxes. N. J. R. S. Cum. Supp. 54:10A-1 *et seq.*, 54:18A-1 *et seq.*

The judgment of the Division of Tax Appeals herein referred to "the assessment levied for the year 1945 on the above described property" (R. 11). The form tax return furnished by the City of Newark was entitled "PERSONAL PROPERTY RETURN * * *" (R. 6), and Item 12 on its face called for deduction of "Tax Exempt and Non-Taxable Securities" in applying the proviso (*id.*).

II

The proviso of the New Jersey statute, as applied, violates Section 3701 of the Revised Statutes of the United States and, therefore, is unconstitutional under the Supremacy clause of the Constitution of the United States.

Section 3701 of the Revised Statutes of the United States (*supra*, p. 6) specifies that, except as otherwise provided by law, all bonds and other obligations of the United States "shall be exempt from taxation by or under State or municipal or local authority." Its validity under the Necessary and Proper clause of the Constitution has not been questioned by appellees and is clear. *Bank* v. *Supervisors*, 2 Wall. 26, 29, 30-31.

The opinion of the Supreme Court of New Jersey made passing reference to Section 3701 (R. 24), but did not discuss it or specify any reason for not applying it. The reason presumably lay in the court's conclusion that the tax was not a property tax. But such characterization of the tax was erroneous, as has been shown (pp. 26-29), and the infringement of Section 3701 is plain. *Bank* v. *Supervisors*, *supra*; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 513-514. See also *Smith* v. *Davis*, 323 U. S. 111.

Section 3701 was derived from provisions contained in a series of earlier statutes commencing with the Act of

February 25, 1862, 12 Stat. 345, 346. These various statutes are collected in a footnote in *Smith* v. *Davis*, *supra*, at 117. Investigation of the legislative history of these statutes and of R. S. § 3701 has disclosed nothing to indicate that the exemption provision of any of them was intended to waive or curtail in any respect the constitutional immunities established by the decisions of this Court in the *Weston*, *Bank of Commerce*, and other cases hereinbefore discussed (pp. 18-20). The exemptions were enacted, apparently, in order to assure that those immunities would be preserved and would extend to legal tender notes issued during the Civil War era. Cf. *Bank* v. *Supervisors*, *supra*. The New York statute taxing the capital of banks without allowing deduction of United States securities in computing the value of such capital, and the decision of the Court of Appeals of New York in *The Bank of the Commonwealth* case, *supra*, p. 19, upholding such statute, may further explain why Congress enacted the exemption in 1862. Cf. *Bank of Commerce* v. *New York City*, 2 Black 620, argument at 625.

In the case of the exemption enacted in Section 1 of the Act of June 30, 1864, 13 Stat. 218, there was considerable debate in Congress.* See Cong. Globe, 38 Cong., 1st Sess., 1864, pp. 3183-3187, 3212, 3214-3218, 3289, 3311, 3326, 3351. At one stage the House sitting in Committee of the Whole adopted an amendment striking out the exemption (*id.*, 3186). An amendment thereupon was introduced affirmatively subjecting the securities of the United States to taxation by or under state authority (*id.*, 3186). Representatives strongly favoring such amendment argued *inter alia*, that the 1862 exemption was a mistake and favored the rich (*id.*). But the amendment was defeated by a narrow margin after Thaddeus Stevens, who was Chairman

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* The exemption provided:

"And all bonds, Treasury notes, and other obligations of the United States shall be exempt from taxation by or under state or municipal authority."

of the House Ways and Means Committee but not in charge of the bill, vigorously opposed it (*id.*, 3186). His statement is quoted in Appendix "B", *infra*, pp. 41-42. The inclusion of the exemption in the bill as finally adopted, combined with the subsequent enactment of similar exemptions in later statutes and their ultimate embodiment in R. S. § 3701, preclude any contention that R. S. § 3701 should be construed to be less extensive than the constitutional prohibition implied by this Court in the contemporaneous bank cases already cited (pp. 18-20).

In the comparatively recent case of *Smith* v. *Davis*, *supra*, this Court interpreted R. S. § 3701 as not applying to an open account claim of a creditor of the United States, but only to obligations or securities of the type enumerated in the statute. The Court stated (323 U. S. at 117):

> "This interpretation accords with the long established Congressional intent to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit."

The judgment of the Supreme Court of New Jersey, if allowed to stand, would subvert that intent of Congress.

The action of Congress, discussed under Point III, in enacting the Public Debt Act of 1941, and therein modifying R. S. § 3701 only to the limited extent of authorizing Federal taxation of the income from United States bonds and like securities, tends to strengthen still further the view that R. S. § 3701 is applicable herein. The history of this modification shows that the sponsors were cognizant of this Court's decisions in the field,* and deliberately re-

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* Comprehensive and detailed analyses of many of this Court's decisions are found in both the majority and minority reports of the Special Committee on Taxation of Governmental Securities and Salaries, issued in 1940 under the title "TAXATION OF GOVERNMENTAL SECURITIES AND SALARIES." Sen. Rept. No. 2140, Parts 1 and 2, 76th Cong., 3d Sess.

frained from proposing any amendment which would affect either the immunity of Federal securities from state taxation, or the immunity of state securities from Federal taxation, as developed in those decisions. 87 Cong. Rec. 851-852, 1005-1010.

III

The Public Debt Act of 1941, as amended, does not authorize state or municipal taxation of the income from United States bonds, and the accrued interest on appellant's Bonds is immune from such taxation to the same extent as the principal.

The court below in its opinion made no distinction between the question of the immunity of the principal of the Bonds owned by appellant and the question of the immunity of the accrued interest thereon. Appellant agrees that no such distinction should be made. None has been made by this Court. *Willcuts* v. *Bunn*, 282 U. S. 216, 227-228, and cases, *supra*, pp. 18-24.

The former New Jersey Supreme Court, however, included in its opinion a statement to the effect that, by virtue of the Public Debt Act of 1941, as amended (quoted *infra*, p. 40 and hereinafter called "§ 742a."), the exemption from State taxation provided in R. S. § 3701 (31 U. S. C. § 742) does not extend to interest upon bonds or similar securities of the United States issued on or after March 28, 1942 (R. 19-20). Since most of the Bonds owned by appellant were issued subsequent to that date (R. 9), the validity of that statement is presented as a question which should be determined so that proper disposition will be made on remand.

Appellant submits that the former New Jersey Supreme Court misapprehended the scope of § 742a. That section in its original form was enacted as Section 4 of the Public Debt Act of 1941. The full title of that Act was:

> "An Act: To increase the debt limit of the United States, to provide for the *Federal* taxation of future issues of obligations of the United States and its instrumentalities, and for other purposes." (Emphasis supplied) (55 Stat. 7).

While the section did not and does not in terms specify that its provisions apply only to Federal taxation, any possible ambiguity is resolved by resort to the legislative history.

The bill, which became the section, was introduced in the House by Chairman Doughton of the Ways and Means Committee, who stated (87 Cong. Rec. 852):

> "The bill makes absolutely no change in existing law with respect to the Federal taxation of State and local securities or the State taxation of Federal securities. The change applies only to the Federal Government's taxation of its own securities and the securities of its agencies and instrumentalities * * *."

Senator Brown, who was in charge of the bill in the Senate as Chairman of the Special Committee on Taxation of Governmental Securities and Salaries, stated (87 Cong. Rec. 1003):

> "It (the bill) taxes the income from obligations of the Federal Government or its instrumentalities, for the purpose of the Federal income tax * * *. It does not give the States any right to tax the income from Federal obligations."

and further (87 Cong. Rec. 1006):

> "With respect to federal taxation, we provide in the pending Bill that from this time on no more federal tax-exempts shall be issued. I do not mean by that that the State of New York or any other State which has power under its own laws to tax income, may tax the income from federal bonds. They would not be

permitted to do so under this Bill. But we do make our future federal issues liable to all federal income tax."

In 1947, when the most recent amendment to the section was proposed and enacted, the Senate Committee on Finance rendered a report (Sen. Rept. No. 275, 80th Cong., 1st Sess.) which again specified that the section

"* * * did not change the existing law with respect to the taxation of Federal securities by the States and their political subdivisions."

(See U. S. Code Cong. Service, 80th Cong. 1st Sess. 1947, p. 1217. See also (Note) 61 Harv. L. Rev. 1245, 1246.)

In view of the foregoing, and this Court's decisions, there can be no doubt that, if the proviso clause and assessment herein are invalid as applied to the principal of the Bonds owned by appellant, they are invalid also as applied to the accrued interest.

Conclusion

The judgment of the Supreme Court of New Jersey should be reversed and the cause remanded for the purpose of correcting the assessment by basing it on the sum of appellant's paid up capital and surplus after deducting the value of the United States Treasury Bonds and accrued interest thereon owned by appellant; and for the purpose of restoring to appellant, pursuant to New Jersey law, the excessive tax collected.

Respectfully submitted,

H. Gardner Ingraham,
Walter Gordon Merritt,
Charles B. Niebling,
Attorneys for Appellant.

Dated: November 1, 1949.

Appendix "A"

Provisions of the Revised Statutes of New Jersey additional to those quoted on pages 3-5 of this brief, and pertinent to be considered therewith, are set forth below. They are followed on page 40 by quotation of the pertinent provisions of the Public Debt Act of 1941.

Several of the New Jersey provisions, as indicated, while enacted in April 1945, were declared not to affect earlier assessments. The provisions which are cited below only by their section number in the Revised Statutes of New Jersey, and without citation of the particular public law by which they were added, were in effect throughout 1945 and at the time of the assessment herein.

Section 54:4-1 of the Revised Statutes (quoted, *supra*, p. 5) was amended by L. 1945, c. 163, § 1 (R. S. Cum. Supp. 54:4-1), effective April 13, 1945, by insertion of the following between the first and second sentences:

> "Personal property taxable under this chapter shall include, however, only tangible goods and chattels and shall not include any intangible personal property whatsoever whether or not such personalty is evidenced by a tangible or intangible chose in action, except as otherwise required by sections 54:4-20, 54:4-21 and 54:4-22 hereof."

(Section 9 of the same statute (L. 1945, c. 163), as incorporated in R. S. Cum. Supp. 54:4-1.1, provides in part:

> **"54:4-1.1. Construction of act; assessment of intangible personal property omitted by assessor prohibited.** Nothing herein shall be construed to affect any pending litigation, nor to repeal, abate, cancel, cause to lapse, or otherwise affect in any manner, any assessment or the lien or obligation to pay any taxes heretofore assessed to any taxpayer, or the legal authority to collect taxes, interest and penalties which

have accrued under any provision of law repealed by this act * * *; provided, however, that * * * no county board of taxation shall by resolution cause to be entered upon the tax duplicate an assessment against any intangible personal property omitted by the assessor, nor entertain any complaint for the adding of omitted intangible personal property, * * *.")

"54:4-2. Taxation of property of corporations. Except as otherwise provided as to particular corporations, all property, real and personal, of a corporation shall be taxed the same as the real and personal property of an individual."

"54:4-9. Personal property; where assessed. The tax on all tangible personal property in this state and on all taxable personal property of nonresidents of this state, except as otherwise provided in this title, shall be assessed in and for the taxing district where the property is found. The tax on other personal property shall be assessed on each inhabitant in the taxing district where he resides on October first in each year."*

"54:4-18. Taxation of personalty of domestic corporations. Corporations of this state shall be regarded as residents and inhabitants of the taxing district where their chief office is located, and their personal property shall be taxed the same as that of an individual, except as in this chapter otherwise provided."

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* By L. 1945, c. 163, § 3, effective April 13, 1945, this section was amended to read as follows; but earlier assessments were not to be affected, as was provided in § 9 (R.S. Cum. Supp. 54:4-1.1; quoted *supra*, p. 35):

"54:4-9. **Personal property; where assessed.** The tax on all tangible personal property in this state shall be assessed in and for the taxing district where the property is found."

(Section 2 of L. 1945, c. 163, repealed the above section, but as provided in § 9 (R. S. Cum. Supp. 54:4-1.1, *supra*, p. 35) earlier assessments were not affected.)

"54:4-35. Period of assessing; assessor's duplicate. The assessor shall begin the work of making assessments upon real and personal property on October first in each year and shall complete the work by January tenth following, on which date he shall attend before the county board of taxation and file with the board his complete assessment list, and a true copy thereof, to be called the assessor's duplicate, properly made up and legibly written in ink, to be examined, revised and corrected by the board as hereinafter provided."

"54:4-36. Assessor's affidavit; form and content. The assessor shall annex on his assessment list and duplicate so filed, his affidavit in substantially the following form:

'I, ..., assessor of the ..... of....., do swear (or affirm) that the foregoing list contains the valuations made by me to the best of my ability, of all the property liable to taxation in the taxing district in which I am the assessor, and that I have valued it, without favor or partiality, at its full and fair value, at such price as in my judgment it would sell for at a fair and bona fide sale by private contract on October first last, and have made such deduction only for debts and exemptions as are prescribed by law'."*

"54:4-105.1. Credit on taxes due upon reduction by board. If any taxpayer shall have paid the taxes upon

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* This section was amended twice in 1945. L. 1945, c. 163, § 7; and L. 1945, c. 260, § 2. The combined result of these was merely to change "on" to "to" in the first line of the text, and to insert "except as otherwise provided by law" after "October first last."

any assessment of property under the provisions o chapter four of Title 54 of the Revised Statutes and shall, upon appeal, have obtained a judgment of the county board of taxation granting a reduction in the said assessment from which neither the taxpayer nor the municipality shall have duly appealed, or shall have obtained a judgment of the state board of tax appeals granting a reduction in such assessment or confirming a reduction granted by the county board or any part thereof, such taxpayer may claim and the collector of taxes of the municipality shall allow a credit, in an amount equal to the appropriate refund incident to such reduction of said assessment, against any taxes then due or to become due on such property; provided, such property is at that time assessed against the same owner as it was at the time the appealed assessment was made. If said assesssment shall be further litigated the taxes found to be due as a result of such litigation, either by way of increase or reduction, shall be adjusted in like manner."

The Corporation Business Tax Act (1945), L. 1945, c. 162, which became effective January 1, 1946, contained the following provisions which are quoted as they appear under Title 54, Subtitle 4 ("PARTICULAR TAXES ON CORPORATIONS AND OTHERS"), Part 1, Chapter 10A, in R. S. Cum. Supp.:

"54:10A-2. Annual franchise tax; foreign corporations. Every domestic or foreign corporation which is not hereinafter exempted shall pay an annual franchise tax for the year one thousand nine hundred and forty-six and each year thereafter, as hereinafter provided, for the privilege of having or exercising its corporate franchise in this state, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this state. And

such franchise tax shall be in lieu of all other state, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this act [chapter]."

* * * * * *

"54:10A-3. Exempt corporations. The following corporations shall be exempt from the tax imposed by this act [chapter]:

(a) corporations subject to a tax under the provisions of article two of chapter thirteen of Title 54 of the Revised Statutes, or to a tax assessed upon the basis of gross receipts or insurance premiums collected; * * *"

L. 1945, c. 132, effective April 10, 1945, contained, *inter alia*, the following provisions which are quoted as they appear under Title 54, Subtitle 4, Part 3A. ("TAXATION OF INSURERS GENERALLY"), Chapter 18A ("TAXATION OF CORPORATIONS * * * TRANSACTING INSURANCE BUSINESS"), in R. S. Cum. Supp.:

"54:18A-1. Payment of annual tax. Every stock, mutual and assessment insurance company organized or existing under any general or special law of this state, and every stock, mutual and assessment insurance company organized or existing under the laws of another state or foreign country and transacting business in this state shall pay to the director of the division of taxation an annual tax, in each calendar year on or before the first day of June, in the amount specified in sections two [R. S. Cum. Supp. 54:18A-2] and three [R. S. Cum. Supp. 54:18A-3] of this act [chapter]."

"54:18A-2. Amount of tax on companies other than life and marine insurance. The tax specified in section

one [R. S. Cum. Supp. 54:18A-1] of this act [chapter], except as to life insurance companies and except as to marine insurance as described by chapter sixteen of Title 54 of the Revised Statutes, shall be two per centum (2%) upon the taxable premiums collected by such company during the year ending December thirty-first next preceding on all business of the company in this state, less the amount of any franchise taxes and taxes on its property, exclusive of taxes on real estate and of taxes payable pursuant to this section, paid in this state by the company pursuant to any law of this state during the said year. * * *"

* * *

The Public Debt Act of 1941 (55 Stat. 9, as amended in 1942, 56 Stat. 190, and in 1947, 61 Stat. 180, and as appearing in Title 31, United States Code, Sec. 742a), provides insofar as here pertinent:

"(a) Interest upon obligations, and dividends, earnings, or other income from shares, certificates, stock, or other evidences of ownership, and gain from the sale or other disposition of such obligations and evidences of ownership issued on or after the Public Debt Act of 1942, by the United or any agency or instrumentality thereof shall not have any exemption, as such, and loss from the sale or other disposition of such obligations or evidences of ownership shall not have any special treatment, as such, *under the Internal Revenue Code, or laws amendatory or supplementary thereto* * * *. (Italics supplied.)

(b) The provisions of this section shall, with respect to such obligations and evidences of ownership, be considered as amendatory of and supplementary to the respective Acts or parts of Acts authorizing the issu-

ance of such obligations and evidences of ownership, as amended and supplemented."

The words of subsection (a) shown above in italics were substituted by the 1947 amendment for "Federal Tax Acts now or hereafter enacted", which had been the language. See H. Rept. No. 423, 80th Cong., 1st Session; and Senate Rept. cited *supra*, p. 34.

Appendix "B"

The excerpt from the Congressional Globe, 38th Cong., 1st Sess., Pt. 4, p. 3186, referred to on page 31 of this brief is:

"Mr. Noble: I move to amend the amendment by substituting the following:

> And all bonds, Treasury notes, and other obligations of the United States, shall be subject to State and municipal taxation, on equal terms, the same as other property.

Mr. Stevens: I suppose the object is to prevent the sale of bonds so as to prevent the further indebtedness of the United States. The vote already taken has been sufficient, I think, to entirely prevent the sale of any one of these bonds. I do not believe that if we adopt that provision, and it comes to be known, by implication even, that States may tax these bonds, one dollar will ever be invested in them.

The policy of the Government has heretofore been not to allow State taxation of the bonds of the General Government for two reasons: in the first place, that they would meet with a readier sale if not subject to State taxation; and in the second place that the Government might, in a case of extraordinary necessity like the present, monopolize the entire revenue to be derived from this description of taxation.

But it seems that now the gentleman from Indiana proposes directly to grant permission to all the States to tax the bonds of the Government. Sir, no man of any wisdom as a capitalist will ever invest a dollar in bonds of that kind. Why, sir, it would subject the governmental bonds to every whim and every change of politics in every State. If a particular Administration of the Government was unpopular with the authorities of a particular State, and they desired to place themselves in an attitude of hostility to the Government, all they would have to do would be to tax the bonds of the Government out of existence; to tax them to such an extent as would be impossible for the Government to stand. That is the attitude in which honorable gentlemen have placed the country by the vote which has just been taken.

Of course every gentleman has the right to vote as he pleases, but it ought to be known that the effect of it is to place the Government at the mercy of the whims, caprice, and malignity of any political party happening for the time being to be in control of a State government.

Now, sir, if when we come into the House the amendment which has just passed this committee should be adopted, I hope my friend from Massachusetts, who has charge of this bill, will be wise enough to withdraw it, and not attempt to put upon the market bonds which no prudent man will ever buy."